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7 CHRISTOPHER OTEY, et al.,  
8 Plaintiffs,  
9 v.  
10 CROWDFLOWER, INC., et al.,  
11 Defendants.  
12

Case No. 12-cv-05524-JST

**ORDER DENYING MOTION TO  
DISMISS AND GRANTING IN PART  
AND DENYING IN PART MOTION  
FOR PARTIAL JUDGMENT ON THE  
PLEADINGS OR TO STRIKE**

Re. ECF Nos. 150, 155, 161, 166

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13 Two motions are pending in this putative collective action for violations of the Fair Labor  
14 Standards Act (“FLSA”). First, Defendants CrowdFlower, Inc., Biewald, and Van Pelt move  
15 under Federal Rule of Civil Procedure 12(b)(1) to dismiss the Second Amended Complaint  
16 (“SAC”) for mootness and lack of jurisdiction. Second, Plaintiffs move for partial judgment on  
17 the pleadings under Federal Rule of Civil Procedure 12(c) or to strike under Rule 12(f) with  
18 respect to certain affirmative defenses. For the reasons set forth below, Defendants’ motion to  
19 dismiss the SAC is DENIED, and Plaintiffs’ motion for partial judgment on the pleadings or to  
20 strike is GRANTED IN PART and DENIED IN PART.

21 **I. BACKGROUND**

22 **A. The Parties and Claims**

23 Defendant CrowdFlower is an internet company that uses technology to distribute small  
24 and simple repetitive tasks to individuals in exchange for pay on a per-task basis.<sup>1</sup> SAC ¶¶ 4, 8,  
25 16-20, ECF No. 121. This outsourcing of small tasks to individuals is commonly referred to as  
26 “crowdsourcing.” CrowdFlower offers much of its work through a website called Amazon

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28 <sup>1</sup> Defendants Lukas Biewald and Chris Van Pelt are the CEO and CTO of CrowdFlower,  
respectively. SAC ¶¶ 9-10.

1 Mechanical Turk (“AMT”). ECF No. 46, Ex. 10. Plaintiffs Christopher Otey and Mary Greth  
2 performed tasks as contributors for CrowdFlower through AMT. Id. ¶¶ 6-7, ECF No. 121.

3 The gravamen of the complaint is that CrowdFlower pays contributors, which it classifies  
4 as independent contractors, less than the minimum wage under FLSA and Oregon law. SAC ¶ 36.  
5 Plaintiffs assert the following claims in the operative complaint: (1) failure to pay minimum wage  
6 in violation of the FLSA; (2) failure to pay minimum wage in violation of Oregon law; (3) and  
7 waiting time penalties under Oregon law.<sup>2</sup>

8 **B. Procedural History**

9 Otey filed this action on October 26, 2012, for claims arising out of the FLSA. Compl. ¶ 1,  
10 ECF No. 1. Otey filed an Amended Complaint on December 20, 2012, in which he added class  
11 action claims against Defendants under Oregon law “to recover unpaid minimum wages and  
12 penalty wages due to Plaintiff and all other similarly situated workers employed by CrowdFlower  
13 in Oregon.” First. Am. Comp. ¶ 1, ECF No. 27. Plaintiffs filed the SAC, which is the operative  
14 complaint, on June 17, 2013. ECF No. 121. Plaintiffs moved for conditional certification of an  
15 FLSA collective action in January 2013, and the Court granted the motion on August 27, 2013.  
16 ECF No. 46; ECF No. 167.

17 Mary Greth filed a Notice of Consent to Join the FLSA Collective Action on April 26,  
18 2013. ECF No. 91. Greth became a named plaintiff on June 17, 2013, when Plaintiffs filed the  
19 operative complaint. See ECF No. 121. On August 1, 2013, Nancy Miller joined the suit by filing  
20 her Consent to Joint FLSA Collective Action. ECF No. 156.

21 Defendants have made several offers of judgment under Rule 68 to Otey and Greth.  
22 Defendants made the last of these offers on July 16, 2013. ECF No. 150, Ex. D. They offered  
23 \$2,148.00 to Otey and \$15,000.00 to Greth to satisfy the individual claims of each of these  
24 plaintiffs. Id. Plaintiffs declined these offers in writing. ECF No. 163.

25 **C. Jurisdiction**

26 The Court has jurisdiction over this action under 28 U.S.C. § 1331.

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28 <sup>2</sup> Plaintiffs bring the second and third claims, both of which arise out of Oregon law, as a class  
action under Rule 23. Id. ¶¶ 76-83.

1           **II. MOTION TO DISMISS**

2           **A. Legal Standard**

3           “A case becomes moot only when it is impossible for a court to grant any effectual relief  
4           whatever to the prevailing party.” Knox v. Serv. Employees Int’l Union, Local 1000, 132 S. Ct.  
5           2277, 2287 (2012) (citation and internal quotation marks omitted). “[A]s long as the parties have  
6           a concrete interest, however small, in the outcome of the litigation, the case is not moot.” Id.  
7           (citation and internal quotation marks omitted). The party asserting mootness carries a heavy  
8           burden of establishing that no effective relief remains for the court to provide.” Chang v. United  
9           States, 327 F.3d 911, 918-19 (9th Cir. 2003) (citation omitted).

10           “Mootness is a jurisdictional issue, and federal courts have no jurisdiction to hear a case  
11           that is moot, that is, where no actual or live controversy exists. If there is no longer a possibility  
12           that an appellant can obtain relief for his claim, that claim is moot and must be dismissed for lack  
13           of jurisdiction.” Foster v. Carson, 347 F.3d 742, 745 (9th Cir. 2003) (internal citations and  
quotation marks omitted).

14           **B. Analysis**

15           Defendants move to dismiss this action for lack of jurisdiction. They argue that the offers  
16           of judgment they made to Plaintiffs Otey and Greth on July 16, 2013, which purportedly “more  
17           than satisfy” the damages these Plaintiffs seek in connection their individual FLSA claims,  
18           mooted Otey and Greth’s individual FLSA claims. ECF No. 150 at 8. Defendants further argue  
19           that because Otey and Greth’s individual FLSA claims are moot, neither Otey nor Greth have  
20           standing to bring claims on behalf of an FLSA putative collective action, and thus, the collective  
21           action claims in the SAC also are moot.<sup>3</sup> If the Court finds that the FLSA claims are moot, the  
22           only remaining claims in the action would be the class action claims that Plaintiffs bring for  
23           violations of Oregon’s labor laws. Defendants urge the Court to conclude that it lacks jurisdiction  
24           over these claims under the Class Action Fairness Act (“CAFA”) because the \$5 million amount-

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<sup>3</sup> Defendants argue that Nancy Miller’s joinder into the suit on August 1, 2013, would not save the  
27           FLSA collective action claims from mootness in the event that the Court finds Otey and Greth’s  
28           individual claims to be moot. This is because Otey and Greth’s individual claims became moot  
         before Miller joined the suit, namely on July 30, 2013, which is the day on which the offers of  
         judgment at issue expired by their own terms. ECF No. 150, Ex. D.

in-controversy jurisdictional threshold is not met. Defendants also ask that the Court decline to exercise supplemental jurisdiction over these claims in the event that it dismisses Plaintiffs' FLSA claims.

Plaintiffs oppose the motion. They argue that their rejection of the offers of judgment did not moot their individual claims because the offers did not fully satisfy their claims, as the offers failed to provide any relief in connection with their request for wage penalties under Oregon law. ECF No. 163.

The Court concludes that Defendants' motion to dismiss must be denied. The Ninth Circuit recently held "that an unaccepted Rule 68 offer that would have fully satisfied a plaintiff's claim does not render that claim moot." Diaz v. First Am. Home Buyers Prot. Corp., Case No. 11-57239, —F.3d—, 2013 WL 5495702, at \*5 (9th Cir. Oct. 4, 2013). This is because, when a Rule 68 offer lapses, the plaintiff possesses "an unsatisfied claim" that "the court could redress by awarding her damages." Id. at \* 6 (citation omitted). As long as the plaintiff has an unsatisfied claim, the plaintiff's claim remains live. Id. (citation omitted). The Ninth Circuit reasoned that "[t]his holding is consistent with the language, structure and purposes of Rule 68 and with fundamental principles governing mootness," which "provide that [a] case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." Id. at \*5 (citations and internal quotation marks omitted).

Here, Otey and Greth rejected Defendants' Rule 68 offers. Even assuming that these offers would have completely satisfied Otey and Greth's individual claims, which Plaintiffs dispute, Otey and Greth's refusal to accept these offers preserved the court's ability to grant relief in connection with these claims. Consequently, under Diaz, neither Otey nor Greth's individual claims were rendered moot by the offers. In light of this conclusion, the Court need not reach the other arguments raised in Defendants' motion to dismiss, because each of them depends on a finding that Otey and Greth's individual claims are moot.<sup>4</sup> Accordingly, Defendants' motion to dismiss is DENIED.

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<sup>4</sup> Diaz was published after the briefing on this motion was completed.

**1           III. MOTION FOR JUDGMENT ON THE PLEADINGS OR TO STRIKE****2           A. Legal Standard****3           1. Rule 12(c)**

4           Motions for judgment on the pleadings under Rule 12(c) are evaluated under the same  
5           legal standard as motions to dismiss pursuant to Rule 12(b)(6). Lopez Reyes v. Kenosian &  
6           Miele, LLP, 525 F. Supp. 2d 1158, 1160 (N.D. Cal. 2007). A party may move for judgment on  
7           the pleadings “after the pleadings are closed . . . but early enough not to delay trial.” Fed. R. Civ.  
8           P. 12(c). ”A judgment on the pleadings is properly granted when, taking all the allegations in the  
9           non-moving party’s pleadings as true, the moving party is entitled to judgment as a matter of  
10           law.” Fajardo v. Cnty. of Los Angeles, 179 F.3d 698, 699 (9th Cir. 1999). ”Judgment may only  
11           be granted when the pleadings show that it is beyond doubt that the plaintiff can prove no set of  
12           facts in support of his claim which would entitle him to relief.” Enron Oil Trading & Transp. Co.  
13           v. Walbrook Ins. Co., Ltd., 132 F.3d 526, 529 (9th Cir. 1997) (citations and internal quotation  
14           marks omitted). A plaintiff is not entitled to judgment on the pleadings where the answer raises  
15           issues of fact or where an affirmative defense, if proved, would defeat plaintiff’s recovery.  
16           General Conference Corp of Seventh-Day Adventists, 887 F.2d 228, 230 (9th Cir. 1989).

**17           2. Rule 12(f)**

18           Under Federal Rule of Civil Procedure 12(f), the court may strike from the pleadings any  
19           “an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.” A  
20           defense is insufficiently pleaded if it fails to give plaintiff fair notice of the nature of the defense.  
21           Wyshak v. City National Bank, 607 F.2d 824, 827 (9th Cir. 1979). “[O]nce an affirmative defense  
22           has been properly pled, a motion to strike which alleges the legal insufficiency of an affirmative  
23           defense will not be granted unless it appears to a certainty that plaintiffs would succeed despite  
24           any state of the facts which could be proved in support of the defense.” Barnes v. AT & T  
25           Pension Ben. Plan-Nonbargained Program, 718 F. Supp. 2d 1167, 1170 (N.D. Cal. 2010) (citations  
26           and internal quotation marks omitted). If a claim is stricken, the court should freely grant leave to  
27           amend when doing so would not cause prejudice to the opposing party. Wyshak, 607 F.2d at 826.

1                   **B.        Discussion**

2                   Plaintiffs move for judgment on the pleadings or to strike certain affirmative defenses.  
3                   ECF No. 155. Plaintiffs argue that defenses 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18,  
4                   and 19 in the operative answer are factually insufficient under the pleading standards of Iqbal or  
5                   are not legally cognizable.

6                   Defendants argue that the Court should deny Plaintiffs' motion because the Iqbal  
7                   plausibility standard does not apply to affirmative defenses.<sup>5</sup> ECF No. 160, at 1. Alternatively,  
8                   Defendants argue that even if Iqbal applies to affirmative defenses, they have "sufficiently pled  
9                   [sic] those defenses so as to provide sufficient notice to Plaintiffs" of the basis for each affirmative  
10                  defense. Id. at 2. With respect to affirmative defenses 7 and 13-19, Defendants argue that  
11                  Plaintiffs prematurely seek a summary judgment ruling and not judgment on the pleadings. Id. at  
12                  11-12. Finally, Defendants argue that to the extent that any of the affirmative defenses at issue is  
13                  actually a denial that was improperly labeled as an affirmative defense, the defense should be left  
14                  intact because Plaintiffs have suffered no prejudice by the mislabeling. Id. at 13.

15                  As a threshold matter, the Court must determine whether Iqbal applies to the pleading of  
16                  affirmative defenses. The Ninth Circuit has not addressed this question. This Court agrees with  
17                  the many judges in this district, however, who routinely apply Iqbal's heightened pleading  
18                  standard to affirmative defenses. See, e.g., Barnes & Noble, Inc. v. LSI Corp., 849 F. Supp. 2d  
19                  925, 928 (N.D. Cal. 2012) (Chen, J.) ("Most courts have held that the Iqbal/Twombly pleading  
20                  standards apply to affirmative defenses, such that they must state a plausible claim for relief.").  
21                  Thus, the Court will evaluate the factual sufficiency of the affirmative defenses at issue based on  
22                  Iqbal's heightened pleading requirements.

23                  The Court now evaluates each of the affirmative defenses at issue in turn.

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26                  <sup>5</sup> Defendants move to seal a document they filed in support of their opposition to Plaintiffs' motion for judgment on the pleadings or to strike, which contains a sample of estimated hourly wages by task for a specific period of time. ECF No. 161. Because the Court did not consider the documents at issue when determining Plaintiffs' motion, the motion to seal is DENIED AS MOOT.

1           **1.       Affirmative Defense No. 2:**

2           Defendants did not employ Plaintiffs or any potential members of  
3           the putative class or any subclass that Plaintiffs purport to represent.  
4           Indeed, among myriad other reasons demonstrating Plaintiffs and  
5           the putative class were not employees, Defendants had no control  
6           over whether Plaintiffs or any member of the putative class ever  
7           performed a task, when, where, why or how a task was performed.  
8           Defendants also had no control over whether once a task was  
9           identified by Plaintiffs or any particular putative class member, that  
10           person chose to finish such task.

11           Answer at 14, ECF No. 149.

12           Plaintiffs argue that this defense “is essentially a denial of Plaintiff’s claims rather than” an  
13           affirmative defense. ECF No. 155 at 8.

14           Defendants argue that even if this affirmative defense actually is an improperly labeled  
15           denial, the defense should be left intact because Plaintiffs have suffered no prejudice by the  
16           mislabeling. ECF No. 160 at 13.

17           The Court concludes that this defense is a denial and not an affirmative defense. Zivkovic  
18           v. S. California Edison Co., 302 F.3d 1080, 1088 (9th Cir. 2002) (“A defense which demonstrates  
19           that plaintiff has not met its burden of proof is not an affirmative defense.”). As such, this  
20           purported defense must be stricken. See E.E.O.C. v. Interstate Hotels, L.L.C., Case No. 04-  
21           04092WHA, 2005 WL 885604, at \*4 (N.D. Cal. Apr. 14, 2005) (Alsup, J.) (striking purported  
22           affirmative defense on the ground that “the role of an affirmative defense is to set forth new matter  
23           beyond the minimum plaintiff must prove”).

24           Plaintiffs’ motion to strike this defense is GRANTED WITHOUT LEAVE TO AMEND.

25           **2.       Affirmative Defense No. 3:**

26           Because Defendants do not at this stage in the litigation understand  
27           the full temporal scope of Plaintiffs’ claims and the claims of the  
28           putative class, Defendants assert this affirmative defense to avoid  
         any potential waiver. That being said, to the extent Plaintiffs or any  
         member of the putative class claims to have performed work outside  
         of the applicable statutes of limitation set forth in 29 U.S.C. § 255  
         and ORS § 12.080, such claims are barred in whole or in part.

         Answer at 14, ECF No. 149.

         Plaintiffs argue that this defense is “speculative and theoretical” because Defendants have

1 not pleaded any facts “from which Plaintiff or this Court can determine the plausibility of any  
2 statute of limitation defense[.]” ECF No. 155 at 9.

3 Defendants argue that requiring such facts at this state of the litigation is “ludicrous”  
4 because Defendants do not have discovery yet as to the putative class. ECF No. 160 at 9.

5 The Court concludes that this affirmative defense does not meet Iqbal’s plausibility  
6 standard, because it does not identify which claims would be barred by the statutes of limitations  
7 mentioned in the defense. Accordingly, Plaintiffs’ motion to strike this defense is GRANTED  
8 WITH LEAVE TO AMEND.

9 **3. Affirmative Defense No. 4:**

10 Plaintiffs’ purported claims may be barred in whole or in part by the  
11 doctrine of judicial estoppel. This defense may also apply to the  
12 purported claims of some or all of the potential members of the  
13 putative class or any subclass that Plaintiffs purport to represent.  
14 This affirmative defense would apply, by way of illustration and not  
15 limitation, if Plaintiffs and/or any member of the putative class filed  
16 for bankruptcy and did not list this action as an asset or took any  
17 other inconsistent position in any judicial action. Because  
18 Defendants do not at this early stage in the action understand the full  
19 legal and factual scope of Plaintiffs’ claims and the claims of each  
20 member of the putative class, Defendants assert this affirmative  
21 defense in order to provide notice and avoid waiver.

22 Answer at 14, ECF No. 149.

23 Plaintiffs argue that this defense, in addition to being speculative, is barred as a matter of  
24 law because judicial estoppel is not a recognized defense to FLSA claims. ECF No. 155 at 10.

25 Defendants respond that they should be given the opportunity to determine whether there  
26 exists “a specific factual basis in discovery for such a defense as to [Plaintiffs] or unknown  
27 putative class members.” ECF No. 160 at 9.

28 The authorities that Plaintiffs cite in support of the proposition that judicial estoppel does  
not apply to FLSA claims are inapposite, because they address the propriety of other defenses that  
are distinct from judicial estoppel. See Bailon v. Seok AM No. 1 Corp., Case No. 09-05483JRC,  
2009 WL 4884340 (W.D. Wash. Dec. 9, 2009) (discussing equitable estoppel); Perez-Nunez v. N.  
Broward Hosp. Dist., Case No. 08-61583-CIV, 2009 WL 723873 (S.D. Fla. Mar. 13, 2009)  
(discussing equitable estoppel); Lemieux v. City of Holyoke, 740 F. Supp. 2d 246, 257 (D. Mass.

1 2010) (discussing laches); Robertson v. Alaska Juneau Gold Min. Co., 157 F.2d 876, 879 (9th Cir.  
2 1946) (discussing waiver).

3 The Ninth Circuit has not addressed the question of whether judicial estoppel can be an  
4 affirmative defense to an FLSA claim. Several courts throughout the country, however, have  
5 concluded that an FLSA claim can be barred by judicial estoppel. See, e.g., Gaskins v. Thousand  
6 Trails, 521 F. Supp. 2d 693, 698 (S.D. Ohio 2007) (holding that FLSA claims were barred by  
7 judicial estoppel); In re Tyson Foods, Inc., 732 F. Supp. 2d 1363, 1373 (M.D. Ga. 2010) (same).  
8 In light of these holdings, the Court concludes that judicial estoppel is a viable affirmative defense  
9 in the context of FLSA claims. The defense at issue, however, is insufficiently pleaded under  
10 Iqbal's heightened pleading standards. Accordingly, Plaintiffs' motion to strike is GRANTED  
11 WITH LEAVE TO AMEND.

12 **4. Affirmative Defense No. 5:**

13 The potential members of the putative class or any subclass  
14 Plaintiffs purport to represent cannot proceed collectively under 29  
15 U.S.C. § 216(b) or Federal Rule of Civil Procedure 23, because they  
16 are not similarly situated in that each Contributor makes his or her  
17 own choice about whether to perform a task, what task to choose,  
18 what skill level or interest level exists, when, where or why a task is  
19 performed, which Contributor Channel to use, and regarding profit  
20 and loss for that individual, among myriad other reasons.  
21 Additionally, Contributors are not similarly situated with regard to  
22 the myriad types of pay structures available and other applicable  
23 defenses.

24 Answer at 15, ECF No. 149.

25 Plaintiffs argue that this defense “is merely another denial of Plaintiff’s allegations, not an  
26 affirmative defense.” ECF No. 155 at 11.

27 Defendants offer no argument in their opposition with respect to this defense.

28 Because this defense is a denial rather than an affirmative defense, Plaintiffs’ motion to  
29 strike is GRANTED WITHOUT LEAVE TO AMEND. See Quintana v. Baca, 233 F.R.D. 562,  
30 564 (C.D. Cal. 2005) (holding that “a defense is an affirmative defense if it will defeat the  
31 plaintiff’s claim even where the plaintiff has stated a prima facie case for recovery under the  
32 applicable law”).

## 5. Affirmative Defense No. 6:

Assuming *arguendo* that Plaintiffs are deemed to be employees under the FLSA or Plaintiff Otey is deemed an employee under Oregon minimum wage laws, their claims lack merit because, upon information and belief, Plaintiffs were paid for all of the time they actually worked, at a rate equal to or greater than the required hourly minimum wage.

Answer at 15, ECF No. 149.

Plaintiffs argue that this defense “is merely another denial of Plaintiff’s *prima facie* allegations” and that Defendants have failed to plead sufficient facts to make the defense plausible. ECF No. 155 at 12.

Defendants respond that the defense is factually sufficient under *Iqbal*. ECF No. 149 at 10.

The Court concludes that this purported affirmative defense actually is a denial.

Accordingly, Plaintiffs' motion to strike it is **GRANTED WITHOUT LEAVE TO AMEND.**

## 6. Affirmative Defense No. 7:

Plaintiffs' purported claims and those of the putative class, to the extent based on a contract theory, are barred in whole or in part by Plaintiffs' contract(s) with Amazon Mechanical Turk and any other relevant third parties.

Answer at 15, ECF No. 149.

Plaintiffs argue that this defense should be stricken because none of their claims are based on a contract; instead, they are premised on statutory minimum-wage violations. ECF No. 155 at 13. Plaintiffs also contend that, in any event, employees cannot waive their FLSA claims via a contract in the manner described in the defense at issue. *Id.*

Defendants offer no argument in their opposition with respect to this defense.

Because FLSA claims cannot be barred by a contract, Plaintiffs' motion to strike this defense is GRANTED WITHOUT LEAVE TO AMEND. See Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 740 (1981) (noting that "FLSA rights cannot be abridged by contract or otherwise waived because this would 'nullify the purposes' of the statute and thwart the legislative policies it was designed to effectuate") (citations omitted).

## 7. Affirmative Defense No. 8:

Plaintiffs' claims and those of the putative class against defendants Biewald and Van Pelt, to the extent Plaintiffs are deemed employees of CrowdFlower under the FLSA or Plaintiff Otey is deemed an employee of CrowdFlower under the Oregon minimum wage laws, cannot be maintained as defendants Biewald and Van Pelt are not subject to individual liability. Neither Biewald or Van Pelt exercised sufficient control over the terms and conditions of the alleged employment and made no decisions with respect to Plaintiffs' alleged employment, let alone decisions which violated the FLSA.

Answer at 15, ECF No. 149.

Plaintiffs argue that this defense is insufficiently pleaded because it fails to contain any facts “to support [a] lack of individual liability.” ECF No. 155 at 13.

Defendants respond that the defense is sufficiently pleaded and that it “unequivocally” gives notice to Plaintiffs. ECF No. 160 at 9.

The Court concludes that the defense does not contain sufficient facts to meet Iqbal's plausibility standard with respect to the degree of control that Biewald or Van Pelt exercised over Plaintiffs. Accordingly, Plaintiffs' motion to strike this defense is GRANTED WITH LEAVE TO AMEND.

## 8. Affirmative Defense No. 9:

Plaintiffs' claims and the claims of "other persons similarly situated" may be barred in whole or in part by any exemptions, exclusions, exceptions, or credits provided in Section 7 of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 207.

Answer at 16, ECF No. 149.

Plaintiffs argue that Defendants fail to identify the exemptions that apply to their claims and the reasons why those exemptions apply, and as such, the defense is factually insufficient. ECF No. 155 at 14. Defendants argue that the defense is sufficiently pleaded because it provides plaintiffs with sufficient notice of the nature of the defense and the grounds supporting it. ECF No. 160 at 8.

The Court concludes that the defense is devoid of any facts that raise the plausible inference that any of the FLSA's exemptions apply to Plaintiffs' claims. Accordingly, Plaintiffs'

1 motion to strike this defense is GRANTED WITH LEAVE TO AMEND.

2 **9. Affirmative Defense No. 10:**

3 To the extent Plaintiffs are entitled to recover additional  
4 compensation, Defendants reasonably believe that Contributors are  
5 not employees and have not willfully or intentionally failed to pay,  
6 liquidated damages should not be awarded and only a two-year  
7 statute of limitations should apply.

8 Answer at 16, ECF No. 149.

9 Plaintiffs argue that this defense is “purely conclusory.” ECF No. 155 at 15. Defendants  
10 respond that the defense provides sufficient notice. ECF No. 160 at 8.

11 The Court concludes that this defense is nothing more than an unsupported conclusion that  
12 contributors are not employees, and as such, it fails to meet Iqbal’s plausibility standard.  
13 Accordingly, Plaintiffs’ motion to strike this defense is GRANTED WITH LEAVE TO AMEND.

14 **10. Affirmative Defense No. 11:**

15 Plaintiffs’ claims and the claims of the putative class are barred in  
16 whole or in part by the provisions of Section 11 of the Portal-to-  
17 Portal Act, 29 U.S.C. § 260, because any acts or omissions giving  
18 rise to this action were done in good faith and with reasonable  
19 grounds for believing that the actions or omissions were not a  
20 violation of the FLSA. Defendants reasonably believed – and  
21 continue to believe – in good faith that Plaintiffs and members of the  
22 putative class are not and have never been employees of Defendants.  
23 Further responding, CrowdFlower’s business model is the same as  
24 all other web-based companies that have chosen to use the crowd to  
25 perform various tasks.<sup>6</sup>

26 Answer at 16, ECF No. 149.

27 Plaintiffs argue that Defendants have failed to plead sufficient facts from which one could

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28 <sup>6</sup> Title 29 U.S.C. § 260 provides that “if the employer shows to the satisfaction of the court that the  
act or omission giving rise to such action was in good faith and that he had reasonable grounds for  
believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938,”  
then the court has the discretion to reduce or eliminate an award of liquidated damages. See Alvarez v. IBP, Inc., 339 F.3d 894, 909 (9th Cir. 2003) (noting that a “court need not award  
liquidated damages in every instance; instead, courts retain discretion to withhold liquidated  
damages” where an employer shows that it “acted in subjective good faith and had objectively  
reasonable grounds for believing that acts or omissions giving rise to the failure did not violate the  
FLSA”).

1 infer that Defendants had reasonable grounds to believe that failing to pay minimum wage would  
2 not violate the FLSA. ECF No. 155 at 15. Defendants argue that the defense provides sufficient  
3 notice. ECF No. 160 at 8.

4 The Court concludes that this defense is deficient under Iqbal, because it fails to articulate  
5 why Defendants reasonably believed that Plaintiffs were not employees. Moreover, Defendants'  
6 contention that "CrowdFlower's business model is the same as all other web-based companies that  
7 have chosen to use the crowd to perform various tasks" does not assist them in pleading a good  
8 faith defense, because customary or even widespread industry practices that violate the FLSA are  
9 not evidence of an objectively reasonable good faith violation. Martin v. Cooper Elec. Supply  
10 Co., 940 F.2d 896, 910 (3d Cir. 1991); see also Laffey v. Nw. Airlines, Inc., 567 F.2d 429, 465  
11 (D.C. Cir. 1976) ("That an employer and others in the industry have broken the law for a long time  
12 without complaints from employees is plainly not the reasonable ground to which the statute  
13 speaks.").

14 Accordingly, Plaintiffs' motion to strike this defense is GRANTED WITH LEAVE TO  
15 AMEND.

16 **11. Affirmative Defense No. 12:**

17 Plaintiffs cannot establish or satisfy the requirements for class  
18 certification pursuant to 29 U.S.C. § 216(b) of the FLSA or Federal  
19 Rule of Civil Procedure 23 given that no two Contributors are alike  
20 in when, where, why, which tasks, the purpose for choosing tasks,  
21 the applicable pay structure and type (monetary or virtual) and  
22 myriad other relevant facts. Because Defendants do not at this early  
23 stage in the action understand the full factual basis of Plaintiffs'  
claims and the claims of each member of the putative class,  
Defendants assert this affirmative defense now in part in order to  
provide notice and avoid waiver. Therefore, the class certification  
allegations of the SAC must be stricken and dismissed.

24 Answer at 16, ECF No. 149.

25 Plaintiffs argue that this defense should be stricken because it is repetitive of their fifth  
26 affirmative defense. ECF No. 155 at 15. Defendants do not make any argument in their  
27 opposition with respect to this defense.

28 Because this defense is a denial rather than an affirmative defense, Plaintiffs' motion to

1 strike it is GRANTED WITHOUT LEVE TO AMEND.

2 **12. Affirmative Defense No. 13:**

3 Plaintiffs' claims and the claims of the putative class are barred in  
4 whole or in part by the provisions of Section 4 of the Portal-to-  
5 Portal Act, 29 U.S.C. § 254, as to all hours during which they were  
6 engaged in activities that were preliminary or post-preliminary to  
7 their principal activities. These activities may include activities  
8 such as powering up a computer, logging into the computer, logging  
into a particular Contributor Channel, opening and loading tasks,  
closing tasks, logging out of websites and or powering down a  
computer, among other such items.

9 Answer at 17, ECF No. 149.

10 Plaintiffs move for judgment on the pleadings with respect to this defense on the ground  
11 that the activities that Defendants have classified as preliminary are compensable when they are  
12 "integral and indispensable" to an employee's principal activities. ECF No. 155 at 16 (citing Busk  
13 v. Integrity Staffing Solutions, Inc., 713 F.3d 525, 530 (9th Cir. 2013) (holding that an activity is  
14 "integral and indispensable," and thus compensable, if it is (1) "necessary to the principal work  
performed" and (2) "done for the benefit of the employer.")).

15 Defendants respond that Plaintiffs improperly seek summary judgment with respect to this  
16 defense, and that the entry of such judgment is improper at this stage of the litigation because  
17 discovery is still in its early stages. ECF No. 160 at 11-12.

18 The Court concludes that Plaintiffs' motion for judgment on the pleadings with respect to  
19 this defense must be DENIED, because the defense raises factual issues that are inappropriate for  
20 determination at this stage of the litigation, namely whether the activities at issue are compensable.  
21 See General Conference Corp of Seventh-Day Adventists, 887 F.2d 228, 230 (9th Cir. 1989) ("A  
22 plaintiff is not entitled to judgment on the pleadings where the answer raises issues of fact or  
23 where an affirmative defense, if proved, would defeat plaintiff's recovery.").

24 **13. Affirmative Defense No. 14:**

25 Any claim for additional compensation by Plaintiffs and the putative  
26 class must be reduced by compensation already paid to them by the  
27 applicable Contributor Channel Partner. See, e.g., 29 C.F.R. §  
785.19.

28 Answer at 17, ECF No. 149.

1 Plaintiffs move for judgment on the pleadings with respect to this defense on the ground  
2 that 29 C.F.R. § 785.19 applies to meal and break times and Defendants have pleaded no facts to  
3 show that they have compensated Plaintiffs for meal and break times.

4 Defendants respond that Plaintiffs improperly seek summary judgment with respect to this  
5 defense, and that the entry of such judgment is improper at this stage because discovery is still in  
6 its early stages. ECF No. 160 at 11-12.

7 Because the question of whether Plaintiffs were compensated for certain activities is a  
8 question of fact, plaintiffs' motion for judgment on the pleadings with respect to this defense is  
9 DENIED. See General Conference Corp of Seventh-Day Adventists, 887 F.2d 228, 230 (9th Cir.  
10 1989) ("A plaintiff is not entitled to judgment on the pleadings where the answer raises issues of  
11 fact or where an affirmative defense, if proved, would defeat plaintiff's recovery.").

12 **14. Affirmative Defense No. 15:**

13 Some work allegedly performed by Plaintiffs and the putative class,  
14 such as tasks chosen because of the individual's personal interests,  
15 for research and survey purposes was completely voluntary in nature  
16 and without CrowdFlower's knowledge or authorization. This is  
17 particularly true as no Contributor is ever required to perform any  
task at any time in any particular manner. Accordingly, certain or  
all tasks then may not constitute compensable working time under  
the FLSA as a matter of law pursuant to 29 C.F.R. § 785.27, et seq.

18 Answer at 17, ECF No. 149.

19 Plaintiffs argue that this defense is insufficiently pleaded because it contains no facts to  
20 show that "any work performed was voluntary or [done] for reasons other than earning  
21 compensation." ECF No. 155 at 17. Defendants respond that Plaintiffs improperly seek summary  
22 judgment with respect to this defense, and that the entry of such judgment is improper at this stage  
23 because discovery is still in its early stages. ECF No. 160 at 11-12.

24 Because this defense is devoid of facts that raise the plausible inference that Plaintiffs  
25 worked voluntarily for research or survey purposes, Plaintiffs' motion to strike this defense is  
26 GRANTED WITH LEAVE TO AMEND.

27 **15. Affirmative Defense No. 16:**

28 Any time spent by Plaintiffs or the putative class was *de minimis*.

1 The vast majority of tasks offered by CrowdFlower on the various  
2 Contributor Channels are capable of being performed in 1 to 2  
3 minutes or less such that the time spent on any given task by a  
4 Contributor is *de minimis*. A significant amount of the time  
5 Plaintiffs spent working on tasks was *de minimis* as outlined in  
6 Defendants' Opposition to Plaintiffs' Motion for Certification of a  
7 Collective Action and Dissemination of Notice. Further, any  
8 determination as to whether the *de minimis* doctrine applies requires  
9 an individualized inquiry, thereby making certification of a putative  
10 class inappropriate.

11 Answer at 17, ECF No. 149.

12 Plaintiffs argue that this defense is factually insufficient because it does not identify what  
13 compensation is *de minimis* or why it is *de minimis*. ECF No. 155 at 18. Defendants argue that  
14 there is "no question that Plaintiffs understand the basis for this defense." ECF No. 160 at 11.

15 The *de minimis* defense permits employers to fail to pay wages for an activity that is  
16 otherwise compensable on the ground that the completion of this activity requires only "a few  
17 seconds or minutes of work *beyond* the scheduled working hours." Anderson v. Mt. Clemens  
18 Pottery Co., 328 U.S. 680, 692 (1946) (emphasis added). For example, the Ninth Circuit has held  
19 that the time spent changing into and out of uniforms at the workplace is not compensable when  
20 the employer does not benefit from or require "on-premises donning and doffing." Bamonte v.  
21 City of Mesa, 598 F.3d 1217, 1235 (9th Cir. 2010). On the other hand, if changing into and out of  
22 uniforms is required by the employer and done for the employer's benefit, then the time spent  
23 putting uniforms on and off is compensable. Ballaris v. Wacker Siltronic Corp., 370 F.3d 901,  
24 911 (9th Cir. 2004).

25 Here, the defense at issue states conclusorily that the time spent on any task is *de minimis*.  
26 Because the defense is devoid of any facts that would raise the plausible inference that the time at  
27 issue was spent "beyond the scheduled working hours," Anderson, 328 U.S. at 692, and was  
28 neither required by nor intended to benefit Defendants, Bamonte, 598 F.3d at 1235, the defense is  
insufficient under Iqbal. Accordingly, Plaintiffs' motion to strike the defense is GRANTED  
WITH LEAVE TO AMEND.

26 **16. Affirmative Defense No. 17:**

27 Defendants received no benefit or value from some of the services  
28 performed by Plaintiffs and the putative class. These services would

1 include services performed related to tasks posted by DIY platform  
2 users and any others for which CrowdFlower does not receive  
3 compensation based on task performance.

4 Answer, ECF No. 149 at 18.

5 Plaintiffs argue that this purported defense has no legal or factual basis. ECF No. 155 at  
6 19. Defendants respond that it is “unmistakably clear” that Plaintiffs have notice of this defense  
7 and its basis. ECF No. 160 at 11.

8 Because this defense is a denial as opposed to an affirmative defense, Plaintiffs’ motion to  
9 strike it is GRANTED WITHOUT LEAVE TO AMEND.

10 **17. Affirmative Defense No. 18:**

11 Upon information and belief, some work such as booting up  
12 computers, connecting to the internet, reviewing and identifying  
13 tasks that a Contributor may then choose to perform, opening,  
14 loading and closing tasks, logging out of the internet or shutting  
15 down a computer, that has been allegedly performed by Plaintiffs  
16 and any putative class member constituted “downtime” or other non-  
17 compensable work hours that was not subject to compensation under  
18 the provisions of the FLSA.

19 Answer at 18, ECF No. 149.

20 Plaintiffs move for judgment on the pleadings with respect to this defense on the grounds  
21 that there is no “downtime” exception to an FLSA minimum wage claim and that this defense is  
22 virtually identical to Affirmative Defense No. 13. ECF No. 155 at 19. Defendants argue that this  
23 defense presents factual issues, and thus, the entry of judgment is inappropriate at this stage of the  
24 litigation. ECF No. 160 at 11-12.

25 Because this defense is duplicative of Affirmative Defense No. 13, Plaintiffs’ motion to  
26 strike it is GRANTED WITHOUT LEAVE TO AMEND.

27 **18. Affirmative Defense No. 19:**

28 Plaintiffs and the putative class are not entitled to equitable relief as  
29 they have an adequate remedy at law.

30 Answer at 18, ECF No. 149.

31 Plaintiffs move to strike this defense on the ground that it does not apply to the claims in  
32 this action, as Plaintiffs purportedly do not seek equitable relief in the SAC. ECF No. 155 at 20.

1 Defendants argue that this defense, as drafted, provides adequate notice to Plaintiffs of the basis  
2 for the defense. ECF No. 160 at 11-12.

3 Because one of the forms of relief that Plaintiffs request in the operative complaint is “such  
4 other relief as the Court deems fair and equitable,” the Court is not persuaded that this defense is  
5 inapplicable to the claims in this action as Plaintiffs’ contend. See SAC at 18. Accordingly,  
6 Plaintiffs’ motion to strike this defense is DENIED.

7 **IV. CONCLUSION**

8 Defendants’ motion to dismiss is DENIED.

9 Plaintiffs’ motion for partial judgment on the pleadings or to strike is GRANTED IN  
10 PART and DENIED IN PART as follows:

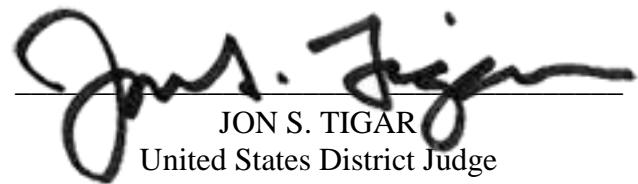
11 1. The motion is GRANTED WITH LEAVE TO AMEND with respect to Affirmative  
12 Defenses 3, 4, 8, 9, 10, 11, 15, and 16. Defendants may re-assert any of these defenses in an  
13 amended answer if they later discover sufficient facts to establish the plausibility of each defense.  
14 The Court will set a deadline for amending the pleadings during the initial case management  
15 conference.

16 2. The motion is GRANTED WITHOUT LEAVE TO AMEND with respect to  
17 Affirmative Defenses 2, 5, 6, 7, 12, 17, and 18.

18 3. The motion is DENIED with respect to Affirmative Defenses 13, 14, and 19.

19 **IT IS SO ORDERED.**

20 Dated: October 22, 2013



21 JON S. TIGAR  
22 United States District Judge

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